Before the
Public Service Commission of South Carolina

Application of Dominion Energy South Carolina, Incorporated for Adjustment of Rates and Charges (See Commission Order No. 2020-313)	**Docket No. 2020-125-E**

Responsive Testimony of Scott Hempling on Liability Language

On Behalf of the South Carolina Department of Consumer Affairs

December 22, 2020

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Q. Are you the same Scott Hempling who filed Direct and Surrebuttal Testimony in this proceeding?

A. Yes.

Q. What is the purpose of your Responsive Testimony?

A. I explain that DESC Witness Rooks's revised tariff language on DESC liability and customer indemnity is confusing and self-contradictory.

In his Supplemental Testimony filed December 16, 2020, Mr. Rooks offered revised language with the intent of "confirm[ing] that the Company maintains responsibility for its negligence consistent with" South Carolina law.[1] When read in combination with the unchanged language, Mr. Rooks's revised language does not achieve his stated intent. After describing relevant principles, I explain the problems, then offer amendments that align the tariff language with that stated intent. A redlined version of DESC's language, showing my recommended clarifications, appears in the Appendix to my Responsive Testimony.

I. Principles

Q. In assessing and revising DESC's proposed language, what principles did you apply?

A. I applied six principles:

- Having received from government the privilege of providing service free from competition, a utility must be accountable to all whose well-being are affected by its actions. Accountability means no escape and no shifting: no escape from responsibility for the harm caused, and no shifting of that responsibility to others.

[1] Rooks Supplemental at 1:21-2:1.

- A firm, clear policy on accountability is especially necessary here, where the former South Carolina Electric & Gas has yet to prove that whatever cultural factors led to the V.C. Summer difficulties have been replaced by a culture of accountability.

- Utility service involves millions of users, tens of thousands of pieces of equipment and thousands of employees. Inevitably, mistakes will happen. The resulting damage can have multiple sources: company fault, customer fault, third-party fault, weather, bad luck. Accountability requires that each source be responsible for the damage it causes.

- To assume that a particular party can never be at fault, merely because some other party or its equipment might also be at fault, is to blur accountability. Blurred accountability lowers a party's risk of being held accountable. Those who face lower risk take more risk. The more risk they take, the more damage they can cause.

- Blurred accountability also increases litigation uncertainty, litigation cost and therefore customer cost. It makes the utility-customer relationship an adversarial relationship.

- Customers do not want their utility having to defend meritless lawsuits—a real possibility because the utility has high visibility and deep pockets; because in electricity damage disputes the utility's equipment and actions are unavoidably involved; and because the utility can seek to recover its litigation costs from its customers.

These six principles support a simple proposition: The customer is responsible for its conduct, while the utility is responsible for its conduct. If the customer is at fault, the customer will be sued. If the customer loses the suit, the customer pays. If the utility is at fault, the utility will be sued. If the utility loses the suit, the utility will pay. Conveying this simple point requires only simple language, as discussed next.

Q. What is your view of DESC's revised language, given Mr. Rooks's stated intent?

A. DESC's revised language does not attain the clarity that Mr. Rooks claims for it. Nor does it align with the above-stated principles. The language seems more focused on making the utility and its customers adversaries than on "confirm[ing] that the Company maintains responsibility for its negligence." In the next four subsections I address each of DESC's

four subsections, explaining the problems and recommending changes. The Appendix redlines my changes into DESC's December 16 version.

II. Section V.D (Company Responsibility)

Q. Explain your concerns with new Section V.D.

A. I have no concerns with new Section V.D. But its combination with the rest of Section V causes confusion and conflict with DESC's now-stated intent. New Section V.D tells us that the liability and indemnity language in Sections V.A., V.B and V.C should not be "construed to limit the Company's responsibility for injury or damage to persons or property resulting from the negligence of the Company or require the Customer to indemnify the Company for injury or damage resulting from the negligence of the Company." As I understand Mr. Rooks's explanation, new Section V.D means that DESC is liable whenever tort law makes the company liable.

If Section V.D means what Mr. Rooks says it means, then the rest of Section V is unnecessary. Once the Company accepts liability for its negligence, tort law does all the necessary work. There is no need for all the language about who owned what "wiring and equipment"; whose "Premises" were involved; or whose "use, care, or handling" led to injury (Section V.A). Nor does it matter what is inside or outside "ten feet . . . of the Company's overhead lines" (Section V.C). In any tort dispute over causation, the foundational facts will be clear: what the Company owns and what the Customer or others own; what actions the Company took and what actions the Customer or others took; and where these actions occurred. If there is no intent to make the customer responsible for DESC's conduct—or for the costs caused by future plaintiffs' lawsuits over DESC's

conduct—there is no need for the multiple references to customers' responsibility for those matters. Those superfluous references do not achieve Mr. Rooks's stated purpose of "avoid[ing] customer confusion."[2] And because customers, like DESC, are subject to tort law, there is no policy reason for DESC's tariff to "articulate [their] responsibility."[3]

In short, all that is necessary is this version of DESC's V.D:

> Nothing in this Tariff shall be construed to limit the Company's responsibility for injury or damage to persons or property resulting from the negligence of the Company; or to require any Customer to indemnify the Company for any reason.

If the Commission adopts this version of V.D, and deletes V.A., V.B and V.C, the confusion goes away.

If instead the Commission wishes to keep Sections V.A, V.B and V.C, amendments to them are necessary because their unchanged wording creates the very confusion that Mr. Rooks says he intended to avoid. I discuss the necessary changes next.

III. Section V.A (General)

Q. Explain your concerns with Section V.A (General).

A. Section V.A raises four distinct problems.

Q. Discuss the first problem in Section V.A.

A. The first problem arises from the first sentence:

> The Company shall not be *in any way* responsible or liable for damages to or injuries sustained by the Customer or others, or by the equipment of the Customer or others by reason of the condition or character of Customer's wiring and equipment, or the wiring and equipment of others on the Customer's Premises.

[2] Rooks Supplemental at 2:7.

[3] *Id.* at 2:7-8.

(emphasis added) The phrase “in any way” could be interpreted to allow DESC to escape liability even when it had fault, thereby confusing and conflicting with DESC’s proposed new Section V.D. The following revision prevents that interpretation while adding clarity:

> In the event of damages to or injuries sustained by (a) the Customer or others or (b) the equipment of the Customer or others, where a contributing factor to such damages or injuries is the condition or character of Customer's wiring or equipment, or the wiring and equipment of others on the Customer's Premises, the Company shall be liable to the extent of, and only to the extent of, its fault.

Q. Discuss the second problem in Section V.A.

A. The second problem arises from this portion of the second sentence:

> The Customer . . . shall indemnify and hold harmless the Company from any claim or loss, including attorney's fees and court costs, arising out of any property damage, business loss or interruption, and/or personal injuries resulting from or which may be *in any way* caused by the operation and maintenance of the Customer's machinery, lines, equipment, apparatus and/or appliances.

(emphasis added) Again the phrase “in any way” could be read to shield DESC from accountability even when it had fault. More generally, if the Company is truly accepting liability for its faults, this indemnity language has no work to do. The utility is liable for damages caused by its faulty behavior; the customer is liable for damages caused by its faulty behavior. There is no need to say, and therefore only confusion caused by saying, that the Customer has to cover claims against the utility. If a plaintiff sues DESC for damages that DESC thinks were caused by the Customer, DESC’s straightforward solution is to move to dismiss the lawsuit; and if that dismissal motion fails, to defend the lawsuit. In that lawsuit, DESC also could seek to join the Customer as a defendant. If the utility then loses the lawsuit, it means the utility was at fault. If the utility was at fault, the Customer should not be covering the utility's liability—not if DESC truly means to

"confirm that the Company maintains responsibility for its negligence."[4] Nor does the utility, on losing the original lawsuit, get a new apple-bite by arguing to some other court that the fault was not the utility's but the Customer's. But that is a possible result of this language, if it remains.

Nor should a specific customer cover DESC's litigation costs even if DESC wins. Defending against meritless lawsuits is a cost of doing business. If the costs are prudently incurred, the proper place for their recovery is the revenue requirement paid by all customers; not the wallet of the customer whose property by happenstance was involved.

Since the indemnity language in Section V.A conflicts with the new language in Section V.D, the Commission should remove it.

Q. Discuss the third problem in Section V.A.

A. The third problem arises from this passage:

> [The Company] shall not be liable for *any damages* on account of injuries to person or property resulting in any manner from the receiving, use or application by the customer of such electrical energy.

(emphasis added) Again the "any damages" language could be read to eliminate the utility's liability even when it had fault. The simple solution is to add to the sentence, after the term "liable," the phrase "except to the extent of its fault".

Q. Discuss the fourth problem in Section V.A.

A. The fourth problem arises from this passage:

> The Customer assumes responsibility and liability for damages and injuries caused by failures or malfunctions of Customer's machinery, lines, equipment, apparatus and/or appliances.

[4] Rooks Supplemental at 1:21-2:1.

This language again could be read to eliminate the utility's liability for even when it had fault. The solution is similar to that for the third concern: At the end of the sentence, add "except to the extent of the utility's fault".

IV. Section V.B (Weather; Defects)

Q. Explain your concern with Section V.B (Weather; Defects).

A. Section V.B states:

> The Company shall not be *in any way* responsible or liable for damages to or for injuries sustained by the Customer or others, or to Customer's machinery, lines, equipment, apparatus, appliances, and/or other property where such injury or damage is *[in] any way* caused by weather, storm, lightning or by defects in or failure of the machinery, lines, equipment, apparatus, appliances and/or other property.

Once again, the phrase "in any way" could insulate DESC from liability for even when it had fault. Again the solution is simple: Precede the sentence with the phrase "Except to the extent of its fault"; and delete the phrase "in any way" both times it appears.

V. Section V.C (Overhead Contact)

Q. Explain your concern with Section V.C (Overhead Contact).

A. Section V.C states:

> The Company shall not be *in any way* responsible or liable for damages to or injuries sustained by the Customer or others, or by the machinery, lines, equipment, apparatus, appliances, and/or other property of the Customer or others, resulting from any work or activity conducted by Customer or Customer's household member, employee, reasonably foreseeable trespasser, invitee, agent, builder, contractor, or subcontractor within ten (10) feet of any of Company's overhead lines. The Customer shall indemnify and hold harmless the Company from any claim or loss, including attorney's fees and court costs, arising out of any overhead high voltage contact where the Customer has actual or constructive notice of such work or activity.

This passage repeats the prior problems. Three changes solve those problems:

- Begin the first sentence with the phrase “Except to the extent of its fault”.
- In the first sentence, delete the phrase “in any way”.
- Eliminate the second sentence, about indemnity, for the reasons described in my discussion of the second problem in Section V.A.

More generally, this passage in V.C seems redundant of those in V.A and V.B. Adverse events can occur inside a customer’s Premises, outside a customer’s Premises, within 10 feet of the overhead or outside 10 feet of the overhead. What matters is fault. The Commission can eliminate V.C without losing meaning.

Conclusion

Q. Please provide your concluding thoughts.

A. There are valid reasons for a commission to consider limiting a utility's liability. Meritless lawsuits aimed at an outsized target can drive up the utility's costs and distract its management.[5] But DESC's proposed language does not address these concerns with sufficient clarity. My recommended revision does. If with this revision DESC experiences numerous meritless tort lawsuits, the Commission can revisit the question.

One last point: One wonders why Dominion Energy didn’t propose this language when it proposed its acquisition of SCANA. If Dominion Energy made the acquisition without having studied the liability provisions in SCE&G’s tariffs, what does that say about its prudence? And if Dominion Energy made the acquisition knowing it wanted to change the language but choosing to get its acquisition approved first, what does that say about its

[5] For detail on this subject, see my *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction* at Chap. 2.F (Amer. Bar Assoc. 2013).

candor? The Commission is now seeing a consequence of SCANA's takeover—not by an acquirer chosen by the Commission through a competitive, merits-only solicitation in which the Commission sets the criteria and selects the best; but rather by an acquirer who appeared in a sole-source, take-or-leave-it context in which comparative merits were irrelevant.

Q. Does this conclude your Responsive Testimony?

A. Yes.

Appendix: Revised Language

As I discuss at the beginning of this testimony, my primary recommendation is to include the following version of DESC's V.D, while deleting V.A., V.B and V.C:

> Nothing in this Tariff shall be construed to limit the Company's responsibility for injury or damage to persons or property resulting from the negligence of the Company; or to require any Customer to indemnify the Company for any reason.

If the Commission instead chooses to retain those three subsections, the draft below incorporates all my recommendations to DESC's submission of December 16, 2020.

V. COMPANY'S LIABILITY

A. General

~~The Company shall not be in any way responsible or liable for damages to or injuries sustained by the Customer or others, or by the equipment of the Customer or others by reason of the condition or character of Customer's wiring and equipment, or the wiring and equipment of others on the Customer's Premises.~~ In the event of damages to or injuries sustained by (a) the Customer or others or (b) the equipment of the Customer or others, where a contributing factor to such damages or injuries is the condition or character of Customer's wiring or equipment, or the wiring and equipment of others on the Customer's Premises, the Company shall be liable to the extent of, and only to the extent of, its fault. The Customer agrees to maintain his, her or its machinery, lines, equipment, apparatus and/or appliances in a safe condition. ~~and shall indemnify and hold harmless the Company from any claim or loss, including attorney's fees and court costs, arising out of any property damage, business loss or interruption, and/or personal injuries resulting from or which may be in any way caused by the operation and maintenance of the Customer's machinery, lines, equipment, apparatus and/or appliances.~~ The Company will not be responsible for the use, care, or handling of electricity delivered to the Customer after it passes the service point, and shall not be liable, except to the extent of its fault, for any damages on account of injuries to person or property resulting in any manner from the receiving, use or application by the customer of such electrical energy. The Customer assumes responsibility and liability for damages and injuries caused by failures or malfunctions of Customer's machinery, lines, equipment, apparatus and/or appliances, except to the extent of the Company's fault.

B. Weather; Defects

Except to the extent of its fault, t~~T~~he Company shall not be ~~in any way~~ responsible or liable for damages to or for injuries sustained by the Customer or others, or to Customer's machinery, lines, equipment, apparatus, appliances, and/or other property where such injury or damage is ~~any way~~ caused by weather, storm, lightning or by defects in or failure of the machinery, lines, equipment, apparatus, appliances and/or other property.

C. Overhead Contact

Except to the extent of its fault, t~~T~~he Company shall not be ~~in any way~~ responsible or liable for damages to or injuries sustained by the Customer or others, or by the machinery, lines, equipment, apparatus, appliances, and/or other property of the Customer or others, resulting from any work or activity conducted by Customer or Customer's household member, employee, reasonably foreseeable trespasser, invitee, agent, builder, contractor, or subcontractor within ten (10) feet of any of Company's overhead lines. ~~The Customer shall indemnify and hold harmless the Company from any claim or loss, including attorney's fees and court costs, arising out of any overhead high voltage contact where the Customer has actual or constructive notice of such work or activity.~~

D. Company Responsibility

~~Consistent with South Carolina's Uniform Contribution Among Tortfeasors Act, S.C. Code Ann. § 15-38-10 et seq., nothing in Sections V.A, V.B, or V.C should be construed to limit the Company's responsibility for injury or damage to persons or property resulting from the negligence of the Company or require the Customer to indemnify the Company for injury or damage resulting from the negligence of the Company.~~

Nothing in this Tariff shall be construed to limit the Company's responsibility for injury or damage to persons or property resulting from the negligence of the Company; or to require any Customer to indemnify the Company for any reason.